EARTHJUSTICE

ALASKA CALIFORNIA FLORIDA MID-PACIFIC NORTHEAST NORTHERN ROCKIES
NORTHWEST ROCKY MOUNTAIN WASHINGTON, D.C. INTERNATIONAL

August 10, 2016

Via electronic mail only

Dan Opalski, Director, Office of Water, Region 10
Angela Chung, Water Quality Standards Unit, Region 10
U.S. Environmental Protection Agency
1200 Sixth Avenue
Seattle, WA 98101

RE: Water Quality Criteria Applicable to Washington State: Approval/Disapproval by EPA

Dear Mr. Opalski and Ms. Chung:

This letter is submitted by Earthjustice on behalf of Puget Soundkeeper Alliance, Columbia Riverkeeper, Spokane Riverkeeper, North Sound Baykeeper, the Pacific Coast Federation of Fishermen's Associations, and the Institute for Fisheries Resources (collectively "Waterkeepers Washington"). Waterkeepers Washington urges the Environmental Protection Agency ("EPA") to disapprove Washington Department of Ecology's ("Ecology") recent submission of Human Health Criteria and Implementation Tools WAC 173-201A, submitted August 1, 2016 ("Ecology Rule") and to quickly finalize EPA's standards for Washington originally proposed September 14, 2015. ("EPA's Rule"). Waterkeepers Washington believes this action necessary in order to fully protect people in Washington State, especially its most vulnerable populations, to fully protect the cleanliness and health of Washington's waters, and to comply with EPA's duties under the Clean Water Act, 33 U.S.C. § 1313(c)(4).

INTRODUCTION AND BACKGROUND

The Clean Water Act requires states to develop water quality standards necessary to meet the requirements of the Clean Water Act, including protecting designated uses of water. 33 U.S.C. § 1313. Those designated uses encompass the "fishable and swimmable" protections of the Clean Water Act: protecting and cleaning up our nation's waters so that they are clean enough for drinking, for direct human contact for fishing and recreation, for healthy aquatic resources, and for catching and consuming fish and shellfish. Water Quality Standards include criteria, often numeric, sometimes narrative, necessary to ensure that the designated uses are attained and protected. When states fail to develop adequate standards, EPA must step in and do so within specified time deadlines. 33 U.S.C. § 1313. "Fishability" encompasses the ability of people to harvest fish and shellfish and to safely eat the harvested fish and shellfish in quantities that those individuals would normally consume. In Washington, harvesting and eating fish, including for subsistence (sustenance) by tribes is the designated use of the waterbody that the Clean Water Act requires be protected.

NORTHWEST OFFICE 705 SECOND AVENUE, SUITE 203 SEATTLE, WA 98104

T: 206.343.7340 F: 206.343.1526 NWOFFICE@EARTHJUSTICE.ORG WWW.EARTHJUSTICE.ORG

Many toxic pollutants accumulate in fish tissue, biomagnifying up the food chain. EPA, Water Quality Standards Handbook § 3.1.3 ("EPA WQS Handbook") ("The consumption of contaminated fish tissue is of serious concern because the presence of even extremely low ambient concentrations of bio-accumulative pollutants (sublethal to aquatic life) in surface waters can result in residue concentrations in fish tissue that can pose a human health risk."). Because state and federal regulators have an obligation to set water quality standards to allow individuals and communities to harvest and eat shellfish safely in the quantities they would normally eat, it is incumbent upon the regulators to determine the amount of fish people actually consume when setting the human health water quality criteria for toxic pollutants. In numerous guidance documents, EPA has made clear that states must use locally-accurate and protective fish consumption rates to set water quality standards. *See, e.g.*, EPA, Methodology for Deriving Ambient, Water Quality Criteria for the Protection of Human Health at 2-13(Oct. 2000) ("EPA 2000 Guidance"). Accurately determining the fish consumption rate is integral to regulators' ability to set protective human health water quality standards such that the level of toxic pollutants are low enough that fish remain safe to eat, even for people who eat greater amounts of fish than others. *Id.*

Similarly, not long after EPA issued its 2000 guidance on fish consumption and human health criteria, a Federal Advisory Committee to EPA issued a report regarding the need for states to ensure that all populations are protected, including those that have particularly high fish consumption rates for cultural, religious, social and/or economic reasons. National Environmental Justice Advisory Committee, *Fish Consumption and Environmental Justice* (2002) ("Environmental Justice Report"). The Environmental Justice Report also emphasized the need to consider that some consumption rates may currently be suppressed due to reduced fish availability and other factors. *Id.* at 43-49.

As EPA is very much aware, Washington has been recalcitrant in adopting human health water quality standards based on an accurate fish consumption rate, including a rate adequate to protect sustenance fishing by tribes and other cultures. Since 2010, on at least eight occasions, EPA repeatedly informed Washington that its fish consumption rate was not accurate and resulting water quality standards not sufficiently protective. *See* Correspondence from EPA to Washington Department of Ecology from Oct. 11, 2010; Dec. 16, 2010; Jan. 17, 2012; Sept. 6, 2012; June 21, 2013; Apr. 8, 2014; Dec. 18, 2014; and Jan. 20, 2015. On December 18, 2014, EPA announced that it had initiated an internal rulemaking process to amend the National Toxics Rule for Washington's human health water quality criteria due to Washington's failure to heed EPA's earlier instruction .

Based upon Washington's failure to propose human health water quality criteria necessary to protect consumers of fish and shellfish in Washington, particularly members of tribes within Washington, on September 14, 2015, EPA made its formal determination under 33 U.S.C. § 1313(d)(B) that Washington's human health criteria, and the fish consumption rate upon which those criteria were based, must be revised in order to meet the requirements of the Clean Water Act. In accordance with the requirements of section 1313(d), EPA also proposed

revised criteria applicable to the State of Washington. 80 Fed. Reg. 55,063 (Sept. 14, 2015) . Most recently, the U.S. District Court ordered EPA to either approve criteria proposed by the State of Washington or finalize federally-promulgated standards for the state no later than November 2016. Given this history, the scientific and legal requirements and underpinnings of the two proposals and the requirement to protect all people in Washington, EPA must finalize its proposed standards and reject the inadequate and noncompliant Ecology Rule.

EPA SHOULD DISAPPROVE WASHINGTON'S PROPOSED CRITERIA AND IMPLEMENTATION OFF-RAMPS AND LOOPHOLES AND FINALIZE EPA'S RULE.

I. EPA'S RULE IS SCIENTIFICALLY AND LEGALLY SUPPORTABLE AS NECESSARY TO ENSURE MEETING THE PURPOSES OF, AND PROVIDING PROTECTIONS REQUIRED BY, THE CLEAN WATER ACT.

Waterkeepers Washington previously submitted comment to the EPA in support of the EPA's Rule. *See* comments dated December 28, 2015, Docket ID No. EPA-HQ-OW-2015-0174. Waterkeepers Washington hereby incorporates and references those comments for inclusion in the record for this decision. Waterkeepers Washington also hereby references and incorporates for this record the comments of various tribal entities, including the Northwest Indian Fisheries Commission, also submitted on EPA's Rule in 2015. These comments remain relevant and applicable and demonstrate that EPA's Rule, while not fully protecting actual fish consumption of tribal members, is scientifically-sound and necessary to the Clean Water Act requirements for protecting designated uses of catching and eating fish and shellfish.

II. ECOLOGY'S RULE IS NOT ADEQUATE TO ENSURE THE PURPOSES AND PROTECTIONS REQUIRED BY THE CLEAN WATER ACT.

Ecology's Rule as submitted to EPA for review and approval is essentially unchanged from the rule it proposed on February 1, 2016. That proposed rule was roundly and appropriately criticized by Waterkeepers Washington as well as multiple tribal entities, including the Northwest Indian Fisheries Commission ("NWIFC") and by EPA itself as inconsistent with best science, the Clean Water Act, and EPA Guidance. Waterkeepers Washington incorporates by this references the comments of Waterkeepers Washington, NWIFC, tribal entities and EPA herein for this record (Waterkeepers Washington and NWIFC had previously copied EPA on their comments to Ecology. Should additional copies be needed please notify me immediately so they can be provided.) Waterkeepers Washington will not repeat the comments and criticism previously submitted in any detail, but will highlight certain provisions below. Ecology's submission of essentially the same rule as proposed in April dictates disapproval.

A. <u>The Fish Consumption Rate Utilized by Ecology Does Not Accurately Reflect Actual Consumption is Not a "Risk Management Choice" by Ecology</u>.

EPA's Rule properly recognizes that all people must be protected from toxins in the water and accumulated in their food, at levels consistent with the amount of food and water they actually consume. Moreover, EPA also properly recognizes that in addition to Clean Water Act

requirements, protection of tribal treaty rights must be considered and made part of any standards proposed by Ecology.[1] Further as stated by NWIFC "[f]ish consumption has been regionally, nationally, and internationally recognized as part of the basic right for indigenous people to be secure in their means of sustenance." The right of tribal members to catch and consume fish *is* the *designated use* of Washington waters and not some "risk management" decision, contrary to Ecology's claim. As EPA states, tribes, as well as all Washington residents, have a right to fish but also a right to consume fish without being exposed to unacceptable health risks and that tribes must not be treated as some subpopulation or "high consuming" population and thereby subject to increased risk.

This also means that EPA must ensure that the reported actual consumption rates represent rates unsuppressed due to concerns over the safety and cleanliness of the food supply or due to decimated fish and shellfish stocks from pollution or overfishing and that EPA recognizes the role treaty rights plays as well as tribes' own water quality standards. *See* research and published papers by Harper and Walker, enclosed and submitted, showing heritage consumption rates far in excess of the 175 g/day used by both EPA and Ecology.[2] EPA has at least acknowledged that unsuppressed fish consumption rates are the appropriate levels to use for water quality standards and that the 175 g/day is a compromise used only because some tribes may decide, for now, to accept this compromise. 80 Fed. Reg. at 55,065.

Earlier comments from NWIFC and the tribes it represents made clear that any acceptance of 175 g/day is based entirely on a temporary compromise and that 175 g/day is not representative of actual fish consumption by tribal members in Washington and not fully protective of tribal health. While Waterkeepers Washington agrees that 175 g/day is more protective and closer to what residents of Washington, including tribal members, actually consume, it is still important to note that this is on the lowest end of the scale and Waterkeepers Washington urges EPA to ensure that it protects the designated uses of catching and eating fish in customary amounts from Washington waters and for EPA to consider a higher, more accurate fish consumption number in order to do so. In particular, given that 175 g/day is not representative of actual tribal consumption, EPA must be vigilant to ensure that Ecology is not allowed to further weaken proposed human health criteria through disregard of best science of EPA Guidance, through failure to revise standards for important pollutants such as methylmercury, or through use of claimed "implementation tools" that are in fact simply off-ramps or delays and loopholes away from compliance and more protections for fish consumers.

---

[1] EPA's proposed revisions to Washington's standards are also consistent with EPA's earlier statements and action with respect to Maine Decision Letter dated February 2, 2015, from EPA to the state of Maine at pp. 2-3, 28, and 37-42.

[2] *See also* surveys from The Confederated Tribes of the Colville Reservation, the Columbia River Inter-Tribal Fish Commission, The Lummi Nation, The Suquamish Tribe, the Swinomish Indian Tribal Community, and the Tulalip and Squaxin Island Tribes, previously submitted and submitted to Ecology and citations in Waterkeepers' December 2016 comment letter to EPA.

B. Ecology's Rule Should Be Disapproved as it Fails to Apply EPA Guidance and Best Available Science and is in Contravention of EPA's Specific Direction and Comments.

1. Relative source contribution.

People's burden of toxins and relative risk, come from a variety of sources. EPA, Human Health Ambient Water Quality Criteria and Fish Consumption Rates: Frequently Asked Questions, available at http://water.epa.gov/scitech/swguidance/standards/criteria/health/methodology/upload/hhfaqs.pdf (copy attached). EPA, therefore, recommends that absent scientific data about relative contributions of sources of toxins to the populations that are to be protected by the water quality standards, states should use a default value of 20 percent (.20) in the water quality standards equation to account for the obvious fact that not all toxins a person ingests will necessarily come from fish. *Id.* EPA further states that if the sources of exposure to a chemical are well-known and documented, a state may use a calculated relative source contribution but EPA recommends that the value not be greater than 80% (.80). *Id.* In its Rule, EPA has rightly elected to follow this template. 80 Fed. Reg. at 55,068. Further, EPA made clear in its comments to Ecology in April that Ecology should act in accordance with EPA guidance and choose a relative source contribution factor between 0.2 and 0.8 using the Exposure Decision Tree as described in EPA's 2000 Methodology. These requirements were echoed by, among others, comments to Ecology from NWIFC and the Puyallup Tribe.

Despite plain direction from EPA and the concerns of tribes, Ecology's Rule continues to ignore this scientifically sound reasoning and continues to base human health criteria on a relative source contribution of 1, thereby weakening protections for all fish consumers, but most especially tribal members. Ecology's rationale appears to simply be that it is a "risk management decision" coupled with a vague states' rights assertion, but there is no scientific reasoning or rationale or source-specific calculations provided to support Ecology's apparently random decision to ignore the science and EPA Guidance. Ecology makes a policy choice divorced from best science.

Of additional concern is Ecology's citation to "consideration of other factors, such as cost and feasibility, in establishing actual compliance levels…" Ecology Overview of Key Decisions in Rule Amendment, August 2016, Publication no. 16-10-025 at p. 37. To the extent that this suggests Ecology is factoring cost into the development of water quality standards and criteria, Ecology acts contrary to the Clean Water Act. Water quality criteria under the Act must be developed to protect designated uses, here catching and eating fish. Cost is not a factor. (Where Congress directs costs to be considered, it is clear in its direction, for example for some standards under the Clean Air Act. Cost is not a valid consideration in setting Water Quality Standards.)

Finally, Waterkeepers Washington joins in the recent letter to you from NWIFC dated August 5, 2016, expressing disagreement with any proposed changes to the relative source contribution for some non-carcinogenic pollutants. Any such change is inconsistent with EPA's stated positions both generally and on this particular rulemaking and is inconsistent with best,

most protective science for tribes in Washington. While it may be appropriate, based upon sound local data, to use a relative source contribution figure somewhere within the .2 to .8 range, it is entirely unwarranted for EPA to allow a relative source contribution figure of 1 as there is no conceivable support for assuming that all of a tribal member's (or any other fish consumer) exposure comes exclusively from eating fish. Further, as NWIFC makes clear, given that EPA and Ecology Rules already use a non-protective and less-than-actual number for fish consumed, additional weakening of the calculations and assumptions will only serve to allow fish consumer to be exposed to unhealthy toxins. EPA should reject any attempt to use an unsupported and unrealistic relative source contribution figure to weaken human health standards.

2. *BCF v. BAF.*

In its rule, EPA rightly uses bioaccumulation factors ("BAF") rather than bioconcentration factors ("BCF"). 80 Fed. Reg. at 55,069. As EPA pointed out previously (and repeatedly), BAFs "account for uptake of a contaminant from all sources by fish and shellfish, rather than BCFs that only account for uptake from the water column," making BAFs more accurate and protective for the designated use, catching and eating fish and shellfish. *See also*, Jon A. Arnot and Frank Gobas, A review of bioconcentration factor and bioaccumulation factor assessments for organic chemicals in aquatic organisms, 14 Environ. Rev. 257, 259-62 (2006), *at* http://research.rem.sfu.ca/papers/gobas/A%20Review%20of%20Bioconcentration%20factor%20(BCF)%20and.pdf; and EPA 2000 Guidance, at 5-2 ("[f]or some chemicals (particularly those that are highly persistent and hydrophobic), the magnitude of bioaccumulation by aquatic organisms can be substantially greater than the magnitude of bioconcentration. Thus, an assessment of bioconcentration alone would underestimate the extent of accumulation in aquatic biota for these chemicals.") (emphasis added). EPA should disapprove Ecology's Rule for its failure to use the more accurate and protective BAF in calculating human health criteria.

3. *80 kg Body Weight Results in a Less Protective Standard and Fails to Consider the Relationship Between Increased Weights, Related Health Effects and Access to Traditional Foods.*

Both Ecology's and EPA's Rules move from a 70 kg (154.32 lbs.) body weight assumption, to 80 kg (176.37), *see* 80 Fed. Reg. at 55,068, that will make standards less-protective. By assuming that people consuming fish weigh more than EPA assumed in the National Toxics Rule, which sets the current standards in Washington, concentrations of toxics will be permitted to be as much as 10% to 15% less protective. Catherine O'Neill, *Washington State's Weakened Water Quality Standards Will Keep Fish Off the Table, Undermine Tribal Health*, Center for Progressive Reform Blog (Mar. 4, 2014), *available at* http://goo.gl/7R04n3 (copy attached). While Waterkeepers Washington acknowledges that this factor is consistent with EPA's general guidance, there are very important considerations for tribal consumption that EPA's use of higher body weight disregards and that in turn run counter to EPA's statements about the importance of protecting tribal consumption at unsuppressed levels as both a Clean Water Act and treaty right consideration.

Traditional foods are crucial to the health of native people and to tribes. Reduced access to traditional foods has resulted in myriad health problems in tribal areas, including increased body weights. A study commissioned by the Karuk Tribe found that "[t]he loss of traditional food sources is recognized as directly responsible for a host of diet-related illnesses among Native Americans, including diabetes, obesity, heart disease, tuberculosis, hypertension, kidney troubles, and strokes." Kari Marie Norgaard, *The Effects of Altered Diet on the Health of the Karuk People* at 5 (2004) (copy attached). The United States Centers for Disease Control & Prevention has also recognized the importance of traditional foods in fighting diseases. *See* Native Diabetes Wellness Program, Centers for Disease Control & Prevention, *Traditional Foods in Native America: A Compendium of Stories from the Indigenous Food Sovereignty Movement in American Indian and Alaska Native Communities* (2013) (copy attached). For the Yakama Nation, the rate of diabetes is twice that of other populations in Washington. *See* O'Neill, *Washington State's Weakened Water Quality Standards*. The use of the higher body weight—potentially associated with decreased access to traditional foods for Native Americans—is directly contrary to best science and EPA guidance and absolutely counter-productive to the requirements that water quality standards protect uses such as traditional food uses. EPA should use the more-protective 70 kg body weight.

III. EPA SHOULD FINALIZE STANDARDS FOR POLLUTANTS THAT ECOLOGY FAILS TO ADDRESS OR WHERE ECOLOGY FAILS TO APPLY BEST SCIENCE.

A. Methylmercury.

Ecology continues to refuse to implement a more protective standard for one of the most prevalent and most toxic water pollutants and fish contaminants despite repeated direction from EPA and despite a wealth of information regarding the need for such standards and how to develop them. EPA should reject Ecology's continued refusal and finalize a criteria for mercury.

In its April comments, EPA made clear that there is adequate information in EPA 2010 guidance for Ecology to develop criterion for methylmercury. Further, EPA developed a criterion in its 2015 proposed rule. The Puyallup tribe also provided information in its April comments to Ecology regarding methylmercury and particular impacts to tribal women as compared to the general population. Ecology's continued resistance and refusal to develop a protective criterion for methylmercury raises serious environmental justice and discrimination issues. Ecology's only excuse is that it is difficult to *implement* a mercury standard. This is not a valid reason. Implementation of standards through permits or Total Maximum Daily Load equations ("TMDLs") occurs under different provisions of the Clean Water Act and there is nothing in the Act that allows a state (or in turn EPA) to fail to *promulgate* water quality criteria protective of designated uses because implementation might be complex or take time. EPA recognized this in its April comments to Ecology. Yet, Ecology provides no valid rationale and no scientific support for its refusal to develop protective mercury standards now (particularly given Ecology's years-long failure to even get to this point in the process). EPA should reject Ecology's groundless excuses and finalize EPA's Rule.

B. PCBs.

Ecology also continues to refuse to promulgate a PCB standard as necessary to meet the requirements of the Clean Water Act. In April EPA "strongly" recommended that Ecology use a 10^{-6} cancer risk level in calculating criteria as dictated by the purposes of the Clean Water Act, treaty rights, and sound science. Nonetheless, Ecology continues to argue that its arbitrary use of 4×10^{-5} to calculate a PCB standard--a calculation different than used for other pollutants--is somehow supportable. Ecology then uses the fact that its arbitrary calculation actually weakens the PCB standard to simply leave the PCB standard at the current, already determined to be unacceptable, level. Ecology's claim that it used a "state-specific" risk level is entirely without merit. Ecology provides no support for using a different risk level either based on state waters or for PCBs (this is the only pollutant where Ecology does this). Ecology's Rule is not protective, is arbitrary, contrary to science and EPA direction, and is discriminatory. Waterkeepers Washington urges EPA to reject Ecology's Rule and to finalize EPA's Rule for PCBs.

C. Arsenic.

Ecology's decision to rely on 10 ug/L for arsenic is untethered from science and is not adequate to meet the requirements of the Clean Water Act. As EPA recognized in its April comments, this will actually make the arsenic water quality standard for Washington *weaker* than its current standard (Ecology's proposal would result in a 555-fold increase in the permitted amount of arsenic in Washington's fresh water), which has already been determined inadequate to meet the requirements of the Act.

Ecology adopts the "drinking water standard," for arsenic, but in doing so fails to meet its Clean Water Act section 304 obligations. EPA has directly addressed this issue and has made plain that Safe Drinking Water Act ("SDWA") standards are not to be used as a substitute for Clean Water Act section 304(a)(1) human health standards:

> The section 304(a)(1) criteria also [should] include fish bioaccumulation and consumption factors in addition to direct human drinking water intake. These numbers were not developed to serve as "at-the-tap" drinking water standards, and they have no regulatory significance under the SDWA. Drinking water standards are established based on considerations, including technological and economic feasibility, not relevant to section 304(a)(1) criteria. Section 304(a)(1) criteria are more analogous to the maximum contaminant level goals. . . of the SDWA. . .[which] do not take treatment, cost, and other feasibility factors into consideration. . .

EPA WQS Handbook, § 3.2.4. As noted by EPA, drinking water standards are standards that a municipal entity has to meet "at the tap" for community water, and that statute allows cost and other factors to be taken into account. Nowhere does the Clean Water Act allow for cost and technology and economic feasibility to be considered when setting standards. Those factors might come into consideration in permitting, but have no place in setting the standards for human health. Congress directed consideration of cost and/or feasibility in other environmental laws

like the Clean Air Act, but pointedly omits those considerations here. Ecology's Rule is based on incorrect interpretation and application of the Clean Water Act and the SDWA.

As to Ecology's concern that some waters in Washington may be naturally high in arsenic, Ecology provides no data and no support for why that should dictate a wholly unprotective standard for all waters. If Ecology has data demonstrating that a particular waterbody has natural levels of arsenic at or above 10 ug/L the proper and legal route for Ecology is to propose a standard for that water that is based upon that actual data and to include a public process and EPA review for that waterbody-specific standard.

D. Dioxins.

Waterkeepers Washington urges EPA to reject Ecology's refusal to promulgate a protective standard for 2, 3, 7, 8, TCDD (dioxin) for carcinogenic effects. Ecology arbitrarily develops a standard for non-carcinogenic effects only, resulting in a weaker standard for dioxin (essentially consistent with Ecology's action throughout the Rule where Ecology takes every opportunity to have a less-protective standard when it chooses to develop a standard at all.) Waterkeepers urges EPA to finalize a standard that protects against both carcinogenic and non-carcinogenic effects of dioxin that is consistent with the most recent Nationally Recommended Criteria for dioxin published in 2002. As stated in Puyallup's April comment, EPA has recommended use of the 1998 World Health Organization Toxicity Equivalent Factors as based on the most recent data and science that is internationally accepted.

Ecology's claim that there is "no reliable factor" is unfounded and not consistent with science. As EPA noted in its April comment, for pollutants of this type, EPA takes an integrated approach and recommends criteria be based on the most-sensitive endpoint presuming a cancer risk level of 10^{-6}, the precise opposite of what Ecology has chosen to do here. Ecology provides no support for its decision to use the most-sensitive endpoint and IRIS data for all pollutants *except* dioxin and arsenic. As a result, Ecology has acted arbitrarily and EPA should disapprove Ecology's submission and finalize EPA's Rule with more protective standards for dioxin.

IV. EPA MUST DISAPPROVE A NUMBER OF ECOLOGY'S COMPLIANCE OFF-RAMPS AND LOOPHOLES LABELLED AS "IMPLEMENTATION TOOLS."

Ecology promulgated "implementation tools," that significantly and negatively affect water quality standards. Because these loopholes and off-ramps will affect water quality standards, they must be subject to EPA review and approval. *Northwest Envt'l Advocates v. EPA,* 855 F.Supp.2d 1199 (D.Or. 2012). Waterkeepers urges EPA to disapprove them as inconsistent with the Clean Water Act and as undermining water quality standards generally.

A. EPA Should Not Allow Variances to Undermine the Proposed Rule.

EPA should disapprove Ecology's proposal for extended, widespread, and unsupported variances from water quality standards. The logic behind Ecology's proposal (and behind EPA's

apparent openness to allowing variances to be widely and regularly applied) is entirely lacking and inconsistent with basic Clean Water Act purpose and principles.

States must set water quality standards to protect designated uses. In many instances, those standards are plainly not being met, in Washington and elsewhere. Where water quality standards are not attained, a state must report this fact to EPA and the water is added to a § 303(d) or impaired water list. 33 U.S.C. § 1313(d). Once on the list, the water body is in the queue for preparation of a clean-up plan—a TMDL. States have a significant amount of time to prepare and finalize TMDLs.

A TMDL sets Waste Load Allocations ("WLAs"), which assign specific load limits to specific point source discharges. In setting WLAs, a state has determined that these are the discharge limits necessary to return the water to meeting water quality standards (along with whatever reductions have been assigned to the Load Allocation ("LA")). If the WLAs do not meet that definition, then the TMDL is deficient and must be redone. Similarly, if the WLA and LA reductions are expected to take an extremely long time it could be argued that the TMDL is deficient because it is impossible to say with any reasonable assurance that the reductions will actually occur, a requirement in EPA's TMDL guidance. Rather, as work on a water body progresses, states reassess and readjust a TMDL as necessary. The water body remains "impaired" in status (and thereby subject to the TMDL clean-up plan) until it achieves water quality standards. This is the straight-forward way that waters are to be cleaned up under the Clean Water Act structure adopted by Congress. The water quality standards set to protect the designated uses of the water serve as the goal and guiding principle toward which the TMDL and its implementation must always be geared. It serves no purpose, and in fact, wholly disrupts this structure to gut the process by rewriting or eliminating the applicable water quality standard. Point sources must have permits to discharge and those permits are to include effluent limitations and other provisions (for example compliance plans) to ensure that the permit is designed to not cause or contribute to violations of water quality standards. In a TMDL situation, a point source will have been assigned a waste load allocation, a part of the TMDL with which point sources must comply. The point source's permit must include limits as necessary to comply with the waste load allocation. Compliance plans are a method to help point sources reach compliance over the course of a permit.

Given this Clean Water Act structure, there is no reason to allow "variances" from water quality standards in the manner allowed by Ecology's Rule. While this rule would result in a modest increase in protection for human health, there can be no justification for an expansion of off-ramps like variances for the unchanged toxics standards, much less for all pollutants.

If EPA allows Ecology to weaken water quality standards, it will simply confuse, exacerbate, perpetuate, (or possibly even create) an impairment situation by allowing more pollution over more time making ultimate clean-up lengthier and more difficult. It is a self-defeating outcome and the opposite of the Clean Water Act goals and requirements. If dischargers need time to employ new technologies or methods to meet stricter permit limits, the

use of compliance plans and schedules ensures they use that time to install aggressive pollution controls, without weakening standards.

In fact, variances can work against the very things regulators claim might require time. For example, if the problem is primarily a non-point source one, downgrading and weakening standards through variances provides a disincentive to moving quickly and aggressively to deal with water quality problems. Application of a loophole like variances simply derails the statutory process of identifying troubled bodies of water and getting to work on a plan for clean-up. Waterkeepers Washington urge EPA to resist attempts by Ecology to expand this failed and unnecessary policy and reject any proposed rules that contain expanded variances. At a minimum, Ecology should not be permitted to expand the use of variances, but should be pushed to narrow their use to very limited circumstances.

Variances to water quality standards are currently allowed (but certainly not required) by EPA rule, but the rule is plain they must be used sparingly. 40 C.F.R. § 131.10. If Ecology insists on the continued use of variances (again, a choice that the Waterkeepers Washington think is not consistent with the requirements of the Clean Water Act), it must be only in circumstances far narrower than what Ecology has proposed. For example, EPA cannot countenance a five-year review schedule for variances. Variances are water quality standards in their own right and as such, must be approved by EPA and must be revisited every three years as part of the required triennial review to justify retention. 33 U.S.C. § 1313(c) and 40 C.F.R. § 131.10(g) and (h). *See also* EPA WQS Handbook, parts 2.7 and 2.8. Renewal of a variance must be fully justified at each three-year mark as again, they are highly contrary to Clean Water Act requirements and purposes and should be carefully monitored and generally disfavored. Variances are required to be as short as possible and during the course of the variance, the discharger must regularly demonstrate that reasonable progress is being made to attain water quality standards. *Id.* This should require, in every permit where a variance is utilized, monthly monitoring and reporting of discharges and progress on reductions; and very specific interim milestones and deadlines for action and progress. Variances should in most instances not extend beyond three years—at most, they might extend for the length of a single permit term with a review at the three-year mark.

Ecology should also not be allowed to use variances for entire stretches of water or for multiple dischargers.[3] That concept is at odds with the Clean Water Act and federal regulation. Variances are not appropriate for anything other than portions (generally small) of water bodies. Applying them to large bodies of water is contrary to the most basic principles underlying the Clean Water Act and its implementing regulations. The scope of the variance must be both discharger- and water body-specific and it should also be pollutant-specific; it should extend for

[3] In fact variances as applied to dischargers isn't correct as discharges must be addressed through permits and water quality based limits—entirely different concepts and different part of the law.

the shortest distance possible in the water body and must be decided and supported with a full rulemaking record, with public comment, on a case-by-case basis.[4]

Certain conditions for a variance are more prone to abuse, such as where human conditions supposedly have permanently altered the water body such that it is not possible to meet standards or would be more environmentally damaging to attempt to do so or where it is economically prohibitive to return the water to meeting standards. It is never appropriate to grant a variance where standards can be attained with reductions on point and nonpoint sources, including elimination of discharges. 40 C.F.R. §§ 131.10(d) and (g).

EPA must insist that its updated water quality standards for Washington are not undone by Washington's use of expansive variances, either as described above or in any other form.[5]

B. EPA Should Not Allow Compliance Schedules to Undermine the Proposed Rule.

Compliance schedules are recognized as an acceptable tool in permitting under limited circumstances. 40 C.F.R. § 122.47. Ordinarily, compliance schedules are appropriate where an existing permittee needs time to comply with a new standard, such as a new water quality standard or a new technology standard or both. Ecology's rules already provide for the use of compliance plans in permitting. The justification for compliance schedules is that compliance with a new standard cannot happen instantly, and so a plan may be created that includes interim, enforceable milestones with a firm date by which time permit requirements must be met. While EPA's regulations do not set a maximum allowable time for compliance schedules, they must ensure compliance "as soon as possible." *Id.* at § 122.47(a)(1). Case law has warned that compliance plans cannot exceed the five-year term of a permit. *Citizens for a Better Environment v. Union Oil Co. of Cal.*, 83 F.3d 1111, 1120 (9th Cir. 1996). Further, "schedule of compliance" as defined in the Clean Water Act plainly contemplates a period of time constrained by the four corners of a five-year permit. 33 U.S.C. § 1362(17). *See also* 40 C.F.R. § 122.2.

Generally, the five-year term of a permit should be more than adequate to bring a facility into compliance—by adding the necessary new technology or entering into pre-treatment agreements or implementing process changes. While Ecology rules currently provide for two permit terms or a full decade—this length of time is unlikely to be necessary and as noted above,

---

[4] Ecology's Rule also appear not limited to just the new human health criteria. That is unacceptable and counterproductive under the Clean Water Act given that many pollutants such as bacteria and nutrients are already a major problem, but with well-known and available fixes and no need for variances. Any such variance proposal would be using the toxics issue as cover for an industry give-away on other pollutants.

[5] These concepts are in addition to the "mixing zones" currently allowed in Washington, another "tool" that undermines the Clean Water Act. Moreover, the potential doubling up (or tripling when considering the additional use of compliance plans and so-called site specific standards) of these "tools" a/k/a off-ramps away from compliance will result in water quality standards being rendered meaningless, a plain violation of the basic requirements of the Clean Water Act.

is contrary to existing law and policy. Anything more than a permit term would avoid compliance as opposed to work diligently on addressing a pollutant discharge problem. If a discharger of pollutants is unable to come into compliance over the course of a decade, then that discharge should not be allowed. Dumping pollutants into our waterways is not a right. Under no other area of the law are violators allowed a decade to come into compliance with the law (for example, worker or patient safety codes, tax laws, traffic codes) and then given an indefinite pass if it is "just too hard." Neither should it be acceptable with requirements for clean and healthy water, and EPA must resist any attempts by Ecology to weaken this rule by expanding compliance schedules such as by removing the ten-year cap on compliance plans.

C. Intake Credits Should Not Be Permitted to Undermine and Weaken the Rule.

Ecology' Rule allows "intake credits", allowing dischargers to discharge water that violates applicable standards if the discharger has supposedly not added pollutants. While EPA has rightly observed that this is a permitting requirement, EPA should disapprove intake credits as having a potential significant impact on the new water quality standards absent some additional conditions. Intake credits are a particularly problematic concept for toxins, such as those at issue in this rulemaking. Many chemicals for which such exceptions will be sought are for chemicals that accumulate in fish tissue and water over time such that even small, potentially undetectable additions are cumulatively harmful. Allowing intake credits without added protection as set for the below could weaken the ability to rid Washington's waters of dangerous pollutants and would contribute to and/or perpetuate the death by a thousand cuts problem of bioaccumulation that Washington is currently experiencing with these pollutants.

Ecology has argued that industry complains toxins are difficult to measure and detect in their discharge in the small amounts dictated by standards, which is why an intake credit is necessary. Close inspection of this rationale shows a lack of logic in then applying intake credits in anything other than a very tightly controlled manner and closely-monitored. If these toxins are indeed difficult to discern, it is not then clear how industry and Ecology would discern whether the polluter is adding to the problem. Many small, "undetectable" amounts will reappear later as a violation of standards downstream, and as a huge bioaccumulation problem at the mouth of the Columbia, the Duwamish, and in Puget Sound, perpetuating the problem. Therefore, EPA should insist that any intake credits must be additionally conditioned on strict laboratory and testing requirements for any discharger seeking an intake credit and must ensure that monitoring occurs frequently with full public disclosure.

Specifically, using PCBs as an illustrative example, Ecology must do more than simply default to the lab analysis Method 608, which provides a Potential Quantitation Limit and effective measure of compliance at PCB effluent concentrations far in excess (i.e., more than 29,000 times higher) of even the current National Toxics Rule standards for PCBs. Method 608 discerns effluent limitation levels of PCBs *only at levels of 0.5 µg/L or higher*. This effectively authorizes the discharge of PCBs in concentrations well in excess of the proper standard effectively negating the standard as well as any actual ability to determine whether the conditions for the "intake credit" are met and will not result in increases of PCBs to Washington waters. In

fact, the failure to require a test method that actually works will result in the "intake credit" loophole *increasing* PCB pollution to Washington waters. Compliance monitoring by Method 1668C is superior to that by Method 608 not only because of its ability to quantify pollutant concentrations in the vicinity of a 0.000017 µg/L, but also because, unlike Method 608, it allows calculation of "total PCBs," in which the human health PCB criteria are expressed. Analysis by Method 1668C is available at multiple laboratories and shipping samples to out of state labs is a standard practice. According to EPA information, some states already use Method 1668C in regulatory programs.

If "intake credits" will be allowed, EPA must require the additional condition that compliance be determined and reported by use of lab analysis methods sufficient to detect relevant levels of the toxins for which such "credits" will be allowed, such as Method 1668C. EPA cannot allow intake credits to effectively negate the new water quality standards because the lab analysis necessary to ensure the intake credit is not abused is not adequate.

Finally, any intake credit must be pollutant, waterbody, and discharger specific—anything more broad and loosely regulated will simply be subject to abuse and will be nothing more than a permit to perpetuate pollution.

CONCLUSION

EPA should finalize its September 14, 2015 rule, without compliance off-ramps and loopholes, as consistent with the Clean Water Act and best science. The State of Washington has demonstrated an unwillingness and/or inability to promulgate human health criteria that are in compliance with the Clean Water Act, EPA Guidance, best science, and the obligation to protect all consumers of fish and shellfish including tribal members. EPA's Rule would better protect all people in the state who consume fish, from average fish-consumers to those at the highest fish consumption levels—native people and Pacific-Asian individuals.

Please feel free to contact the undersigned with any questions. We look forward to working with EPA in ensuring that compliant, more protective standards are developed quickly.

Sincerely,

Janette K. Brimmer

cc: Miles Johnson, Columbia Riverkeeper
Chris Wilke, Puget Soundkeeper Alliance
Jerry White, Spokane Riverkeeper
Lee First, North Sound Baykeeper
Glen Spain, PCFFA and IFR
Northwest Indian Fisheries Commission
Columbia River Intertribal Fish Commission